

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD P., by and for R.P.,  
and DENISE L, by and for K.L.,  
Plaintiffs

v. CIVIL ACTION NO. 03-390 ERIE

SCHOOL DISTRICT OF THE CITY OF  
ERIE, PENNSYLVANIA, et al.,  
Defendants

PRETRIAL MOTIONS

Proceedings held before the HONORABLE  
SEAN J. McLAUGHLIN, U.S. District Judge,  
in Courtroom C, U.S. Courthouse, Erie,  
Pennsylvania, on Monday, November 14, 2005.

APPEARANCES:

EDWARD A. OLDS, Esquire, and CAROLYN SPICER,  
RUSS, Esquire, appearing on behalf of the  
Plaintiffs.

Ronald J. Bench, RMR - Official Court Reporter

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1 PROCEEDINGS

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3 (Whereupon, the proceedings began at 1:26 p.m., on  
4 Monday, November 14, 2005, in Courtroom C.)

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6 THE COURT: All right, we have two matters to take  
7 up. We have the motion to amend the complaint, then most  
8 recently we have a motion seeking clarification of order  
9 granting partial summary judgment, and plaintiffs' motion for  
10 leave to reply to defendants' opposition to plaintiffs' motion  
11 to amend complaint or, alternatively, motion for stay to permit  
12 exhaustion of administrative remedies. All right, Mr. Olds, do  
13 you want to come up to the podium.

14 MR. OLDS: Your Honor --

15 THE COURT: Before you start, I have a feeling that  
16 we may, and I underline may, be able to shorten our discussion,  
17 maybe not. But I have read these papers, I read them, the most  
18 recently filed batch and I went back and looked at the hearing  
19 on the motion for partial summary judgment, particularly  
20 insofar as it relates to your request to recover damages based  
21 upon the placement of the children at Sarah Reed. And let me  
22 make an observation. It strikes me that everyone has perhaps  
23 been missing the obvious here. And that is if you have and  
24 pled a viable Title IX claim based upon the alleged sexual  
25 harassment and abuse which occurred, and you have, and if.

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1 Title IX is nothing more in the sense than a vehicle to redress  
2 certain types of tortious conduct, then why aren't you -- if a  
3 jury returns a verdict in your favor on the underlying  
4 liability issues, why isn't the district liable as a matter of  
5 law for all sequelae for damages that naturally flow from that,  
6 including your claim, if proven, that the children sustained  
7 additional psychological injury as a result of the placement?

8 MR. OLDS: Well, I think that the answer to that is

9 they probably are. The school district probably is liable

10 under tort theory for all of that.

11 THE COURT: Under Title IX?

12 MR. OLDS: And under Title IX.

13 THE COURT: So what are we talking about. I didn't

14 make that clear, I am subsequently -- I'm not going do it yet

15 because I'm going to give Mr. Marnen a chance to disabuse me of

16 it -- but if that's the case, doesn't that go a long way

17 towards clearing a lot of this up?

18 MR. OLDS: Absolutely, it does.

19 THE COURT: All right, let me hear from Mr. Marnen.

20 Do you want to respond to that point?

21 MR. MARNEN: Your Honor, I think I agree with you.

22 THE COURT: I told you this would move faster.

23 MR. MARNEN: I think I do.

24 THE COURT: It was unspoken at the first hearing,

25 but I'm not even sure -- put it this way. It appears to me

1 that both of you were ships passing in the night on this

2 amendment issue to a certain extent. Do you concede, only for

3 purposes of this hypothetical, if the school district is found

4 liable for deliberate indifference on the Title IX claim, and

5 as a result of which the harassment and abuse causally

6 occurred, then you would also be liable for any foreseeable

7 sequelae of that, including, if they can prove it, any

8 additional psychological damage sustained as a result of the

9 placement?

10 MR. MARNEN: Yes, sir.

11 THE COURT: All right.

12 MR. MARNEN: Except that, and this is where I want

13 to clear things up. What I am conceding is that the school

14 district would be responsible under Title IX for all sequelae

15 following -- assuming it was proved to the jury, deliberate

16 indifference to the harassment at Strong Vincent.

17 THE COURT: Right.

18 MR. MARNEN: And that those sequelae would include

19 all emotional distress thereafter.

20 THE COURT: Right.

21 MR. MARNEN: Even though some of that emotional

22 distress -- even though a contributing factor may have been

23 inappropriate treatment at Sarah Reed, I think, however, that

24 the plaintiffs want to talk about the appropriateness of that  
25 treatment, too, and that's what I'm objecting to. And so

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1 technically they --

2 THE COURT: I think, I'm going to return to him in a  
3 second, but the way I see this thing teed up is the plaintiff  
4 wants to amend the complaint, one, to state a 1983 claim under  
5 IDEA or a violation of IDEA's procedural requirements, plus the  
6 result that was obtained, that's number one?

7 MR. MARNEN: Yes, sir. They'd also like to call  
8 that Title IX.

9 THE COURT: And, secondly, they want, rather than  
10 Title IX providing a remedy based upon an underlying deliberate  
11 indifference with respect to the one-on-one harassment, it  
12 strikes me that the plaintiff wants to amend to state a  
13 separate Title IX claim for what was essentially an IDEA  
14 violation?

15 MR. MARNEN: I agree with that. I'm not sure they  
16 do.

17 THE COURT: Well, I'm going to let him speak to it.

18 But, in any event, let me get him back up here now. Because it  
19 will work better if he can state his views on that. Now, we're  
20 kind of now -- we're in the clarification mode, I'm addressing  
21 your motion to clarify. Notwithstanding the fact that you can  
22 recover all your damages for this inappropriate placement, you  
23 now still want to bring a separate claim under IDEA and 1983?

24 MR. OLDS: Well, if I can recover all of my --

25 THE COURT: Pain and suffering, psychological

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1 damage.

2 MR. OLDS: Arising out of the placement, I don't  
3 need to bring the IDEA action. I think that originally we saw  
4 it as a Title IX, I think it might be an IDEA violation there.  
5 But I think, assuming that the transfer is part of the Title IX  
6 case, then I don't need the IDEA claim.

7 THE COURT: I want to be clear on it because I don't  
8 want to be unintentionally vague and create confusion at time  
9 of trial. To be clear on this, you do not have an independent  
10 Title IX claim based upon what you claim to be the  
11 inappropriate, the failure to follow IDEA procedures and the

12 alleged inappropriate placement, which would include a failure  
13 to provide sufficient psychiatric services, you don't have  
14 that. But what you do have is a viable Title IX claim for  
15 damages -- for injury on the front end, which would include any  
16 damages you claim you sustained as a result of the  
17 inappropriate placement, do you understand that?

18 MR. OLDS: Yes, I do. My only quibble would be  
19 that - and just really for purposes of clarification because I  
20 think what you're suggesting covers our concern, but if I can  
21 just step back for a second.

22 THE COURT: All right.

23 MR. OLDS: Sarah Reed served two functions for the  
24 Erie School District. One was it was an alternative education  
25 placement for children with discipline problems.

7

1 THE COURT: Right.

2 MR. OLDS: Two, it offered a partial hospitalization  
3 program for kids who had had disabilities. So the evidence  
4 which we suggest that the placement there was for the first  
5 reason, as an alternative educational placement for children



6 with behavioral problems. If that was done, that violates  
7 Title IX, irrespective of the IDEA, according to us. But if we  
8 can allege the damages that the placement, that their  
9 placement -- and if there are resulting damages from the  
10 placement, we achieve there --

11 THE COURT: You know what this is like, this is like  
12 the Last Regatta case, except in a different context. That is  
13 if you're injured in an automobile, if the tortfeasor injures  
14 someone in an automobile accident, and that person is then  
15 taken to a hospital where they received substandard care, that  
16 person is on the hook for everything. And Title IX is just a  
17 statutory vehicle to redress what is really a statutory tort.  
18 And so I view it the same way.

19 MR. OLDS: Well, if that's the case, then that  
20 serves to clarify.

21 THE COURT: I am going to get an order on the record  
22 here with respect to these various matters. Is there anything  
23 else you want to tell me -- at the risk of looking a gift horse  
24 in the mouth, you may not want to?

25 MR. OLDS: No, there's nothing else, your Honor.

1 MR. MARNEN: May I, your Honor.

2 THE COURT: Come on back up here.

3 MR. MARNEN: I want to make sure I understand. I  
4 think your Honor is saying, I think we've just agreed, but I'm  
5 not sure. That the wrongful conduct of which the plaintiff may  
6 complain at trial is limited to the indifference displayed at  
7 Strong Vincent High School, and it does not include the  
8 referral or placement at Sarah Reed, even though as a matter of  
9 law we're responsible for whatever happened during the course  
10 of that?

11 THE COURT: In essence, that's right, but to put a  
12 finer point on it. The question as to whether or not the  
13 conduct was appropriate -- from a liability standpoint, the  
14 question as to whether the placement was appropriate or  
15 inappropriate, whether viewed through the IDEA lens or  
16 something else is irrelevant -- to the plaintiffs' ability to  
17 recover damages for that. But in order for the plaintiff to  
18 recover damages for that conduct, it's still, as it would be  
19 true for any discreet element of damage, has to be proven by a  
20 preponderance of the evidence. In other words, has to come

21 forward with psychiatric evidence from which a jury could

22 conclude that it is more likely than not that the children

23 suffered additional psychiatric trauma as a result of the

24 placement. Does that make it clear?

25 MR. MARNEN: Yes, it does, thank you.

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1 THE COURT: All right. By the way, just before you

2 go. Did they place the children there for their safety or did

3 they place the children there because the school thought they

4 had behavioral problems?

5 MR. MARNEN: We have a clear difference of opinion

6 on that.

7 THE COURT: I'm only asking for the position of the

8 school district?

9 MR. MARNEN: The school district's position is they

10 were placed there for two reasons. One was for safety and the

11 second one was for attending to their emotional needs. I think

12 the plaintiffs agree with the first part, but disagree with the

13 second. That they, I think that they are characterizing it as

14 a disciplinary placement based upon inappropriate conduct by

15 the plaintiffs. Although, there is some discussion in their  
16 brief about safety. I'm not sure, maybe you want to talk about  
17 that.

18 MR. OLDS: I think that ultimately a jury is going  
19 to have to decide -- decide the motive in the placement.

20 THE COURT: No, they're not. No, they're not,  
21 you're not listening to me. Why would they have to. It  
22 doesn't matter whether it was good intentioned or bad  
23 intentioned, if as a result of the action your children were  
24 damaged, they can recover.

25 MR. OLDS: Okay, then I can answer your question,

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1 the school district said to the parents originally we're  
2 placing the kids their for their safety.

3 THE COURT: All right. By the way, this was just  
4 academic interest on my part, not that I consider the reason  
5 germane to a resolution of that claim.

6 MR. OLDS: I understand that. But just let me  
7 clarify. The paperwork suggested it was for behavioral  
8 problems. And then now at deposition they said we did it to

9 make them healthy. So there are three reasons that the school

10 district has said that. But I understand your point that if we

11 prove the original, the underlying tort and the continuing

12 injury, then the school district is liable for the continuing

13 injury.

14 THE COURT: That's my view. All right, let me get

15 an order on the record.

16 ORDER

17 Presently pending before the court is a motion to

18 amend the complaint -- pertinently, which would include a claim

19 under 1983 for a violation of the IDEA provisions. Based upon

20 the discussion which I just had with plaintiffs' counsel and

21 which will be explained more fully in connection with my

22 discussion on the motion for clarification, I am informed by

23 plaintiffs' counsel that the IDEA claim will not be pursued

24 under the guise of a 1983 action and, consequently, the motion

25 to amend the complaint in that respect is denied as moot.

1 With respect to the motion for clarification of the

2 order granting partial summary judgment, to the extent that I

3 haven't made it clear earlier in the discussion, in my view the  
4 present Title IX claim as it exists provides a remedy for any  
5 damages flowing from the original assaults. Including any  
6 emotional or psychological harm, if proven, sustained as a  
7 result of the children's placement at Sarah Reed. To put a  
8 finer point on it, I am not saying that there is a separate  
9 Title IX claim growing directly out of the alleged  
10 inappropriate placement at Sarah Reed, rather, the  
11 inappropriate placement at Sarah Reed is the damage tail, if  
12 proven, which rides on the body of the original Title IX claim,  
13 which is the claim based on sexual harassment or abuse. So I  
14 granted the motion for clarification because I've just  
15 clarified.

16 Plaintiffs' motion for leave to reply to defendants'  
17 opposition to plaintiffs' motion to amend complaint is denied  
18 as moot.

19 And plaintiffs' motion for stay to permit exhaustion  
20 of administrative remedies is denied as moot, given the  
21 withdrawal of the 1983 IDEA claim.

22 All right. So all the motions are gone now, this  
23 thing is teed up as well as it's ever going to be. Off the  
24 record.

25 (Discussion held off the record.)

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1 (Whereupon, at 1:45 p.m., the proceedings were  
2 concluded.)

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7 C E R T I F I C A T E

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11 I, Ronald J. Bench, certify that the foregoing is a  
12 correct transcript from the record of proceedings in the  
13 above-entitled matter.

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18 Ronald J. Bench

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